

Bureau Conclusions, ¶326 P. 168. In fact, the agreements demonstrate Raystay's continued interest and efforts to build the permits. If Fenstermacher had lived up to the agreements, the stations would have been built with Raystay as the licensee. The efforts of TBF and the Bureau to picture these agreements as evidence of Raystay's attempt to abandon the permits is specious.

2. George Gardner's Intentions Concerning the Permits

123. In ¶290 of its proposed findings (P. 220), TBF makes the claim that when the Fenstermacher agreements were terminated, George Gardner had made a definitive decision not to build the LPTV stations. Paragraph 290 reads as follows:

Because Raystay could not solve the critical problem of securing cable carriage for LPTV programming, it was not able to develop a viable business plan for building the new stations. (Tr. 5269-70.) Thus, as far as George Gardner was concerned, construction was out of the question:

"My experience with TV40 absolutely got in my way of doing anything without having a viable business plan. I had learned my lesson there. And there was no way that I was going to go ahead." (Tr. 5270, emphasis added.)

In Gardner's view, a business plan, to be viable, had to show a break-even point within a reasonable time, perhaps three years. (Tr. 5274.) He saw no such prospect if he expanded Raystay's LPTV operation by building the new stations. To the contrary, he testified:

"If I can't see a way to make the payroll, then I can't see how to stay in business. So this was pretty clear to me that I couldn't go through with it. I was having enough difficulty with TV40 that I certainly couldn't take on any additional burden." (Tr. 5276, emphasis added.)

TBF then goes on to discuss the dealings between Raystay and TBN from late August to early December of 1991. TBF Findings, ¶¶291-292.

124. TBF can only claim that George Gardner abandoned any intention of building the LPTV stations in 1991 by grossly distorting the record. The record is full of instances where George Gardner testified that he wanted to develop a viable business plan and build the stations until he decided to turn the permits in in 1993. TBF simply ignores that testimony. Moreover, the testimony it does cite is taken grossly out of context.

125. George Gardner repeatedly testified that he wanted to develop a viable business plan and build the stations. With respect to the extension applications, he testified at Tr. 5277:

Well, I can't see the future that well. The reason we applied for these construction permits in the first place was to put them on the air. And my difficulty with TV40 caused me to go much slower than I probably would have if I hadn't had the TV40 experience.

But we were still hopeful we would find a way to make it work. We did dedicate a lot of time to it. And we had several situations that I felt were going fairly well. And the application for extension was something that we needed to do.

At Tr. 5339, George Gardner testified:

Raystay had specific funds to construct the permits. All we needed in place was a viable business plan. And if we would have been able to put a viable business plan together, we would have gone to the lender, if that would have been required, and asked to use the funds to do that.

The reference to the lender was a reference to Raystay's agreement with Greyhound Financial Corporation, which was not entered into until the end of July 1992. TBF Ex. 264. That testimony shows that George Gardner still wanted to build the stations after July 1992.

126. With respect to the July 1992 set of extension applications, George Gardner stated his belief that he kept current on a company whose transmitter he was interested in using for the LPTV construction permits. Tr. 5285-5286. Earlier in his testimony (Tr. 5272), George Gardner had explained:

I kept myself informed generally on what was needed as far as the equipment so that if we managed to put a business plan together I'd be ready to go with the equipment proposal.

Clearly, if George Gardner had no intention of ever building the stations, there would be no need to have an equipment proposal ready.

127. At Tr. 5237, George Gardner testified:

Our experience with TV40 convinced me that without a viable business plan it was not a proper idea to go ahead and do anything. And we worked diligently to try to make TV40 into a viable entity. We worked diligently to try to find a business plan where the construction permits could be tied in with it. And nothing worked.

128. Mr. Sandifer's testimony also demonstrates that Raystay wanted to build the Lancaster and Lebanon stations. At Tr. 5172-5173, he testified:

Q. So it would be fair to state that during the second extension period you never saw anything that looked like a viable business plan.

A. Well, I think there were a number of proposals that would, could have been developed into a viable business plan. But, but none of them were complete and could be implemented during this period and, and there was -- you know, George Gardner's approach through a long period of time was, you know, bring me a plan that works and I'll, you know, we'll, we'll find a way to fund it.

He made the same point at Tr. 5176-5177:

Q. And in the course of those conversations, did George Gardner ever express to you or did you come to

understand why George Gardner wished to have the construction permits for Lebanon and Lancaster extended?

A. My understanding, and I think I've already testified that George Gardner left the door open on many occasions for the development of a viable business plan. George Gardner is quite interested in LPTV. He's devoted a lot of time and energy and expense to development of TV40. And I, you know, I think he, he felt these construction permits were valuable to the company.

129. Furthermore, David Gardner's actions provide further proof that Raystay did not abandon the idea of building the Lebanon and Lancaster stations in 1991. As late as October 1992, David Gardner wrote a memorandum proposing an idea for building the stations. Glendale Ex. 221, Tr. 4948. Clearly, David Gardner was never told that Raystay had foreclosed the possibility of building the stations. Moreover, George Gardner and Mr. Sandifer did not dismiss the proposal out of hand, but they considered it. George Gardner determined there were technical problems with the proposal. Tr. 5171-5172.

130. Trinity simply ignores this overwhelming body of evidence that George Gardner wanted to develop a viable business plan and build the stations. The two pieces of testimony it does rely upon are twisted out of context. With respect to the testimony at Tr. 5270, the question that George

Gardner was responding to makes clear that he was not saying he would never build the stations:

Q. And it's true, is it not, that unless you found programming that you considered would make the stations viable you weren't going to build the stations. (Emphasis added).

In other words, he testified that he would not build the stations without suitable programming, not that he would never build the stations. Similarly, when the testimony at Tr. 5276 is read in context, it is clear that he is saying he wanted a business plan before beginning construction, not that he had no intention of ever building the stations. Trinity's argument is based upon a view of the record that is not entitled to any credence.

3. The Raystay - Greyhound Agreement

131. Glendale showed in its proposed findings and conclusions that the loan agreement between Raystay and Greyhound Financial Corporation (Greyhound) was irrelevant to the extension applications and that Raystay had no obligation to report anything concerning that agreement. Glendale Findings and Conclusions, ¶¶413-418, 666-669 Pp. 219-221, 389-392. In ¶302 of its proposed findings (Pp. 226-227), TBF attempts to lay the predicate for an argument that the Greyhound agreement was significant because it barred Raystay from constructing the stations. It writes:

Restrictions imposed by Raystay's lender starting in August/September 1991 also effectively precluded Raystay from budgeting any moneys for LPTV development. In the second quarter of 1991, Raystay began negotiating with Greyhound Financial Corporation ("GFC") to refinance Raystay's business. (Tr. 5051.) As part of GFC's preliminary commitment to give Raystay additional financing, the parties executed a letter agreement in late August or early September 1991 which provided that Raystay could not fund any LPTV construction or operation with either GFC loan proceeds or revenues generated by Raystay's cable systems. (TBF Ex. 261, p. 2; Tr. 5060-63.) Since TV40 was already heavily subsidized by cash flow from the cable systems (Tr. 5065; TBF Ex. 256, pp. 1-2), GFC's restriction left Raystay with virtually no way to fund the development of its LPTV construction permits.

132. TBF's argument flies in the face of reality. It is apparent from a review of TBF Exs. 261-264 that TBF Ex. 261 is not a binding agreement but a proposal. There were no binding restrictions and no binding agreement until July 1992. TBF Ex. 264. Counsel for TBF so admitted in the following exchange (Tr. 5091-5092, emphasis added):

Q. And knowing that was Greyhound's position, did, did Raystay give consideration to, to making expenditures that would have violated those, those restrictions that, that Greyhound was indicating it wanted to impose?

MR. SCHAUBLE: Objection.

BY MR. EMMONS:

Q. I can see -- I do not mean to say that those were legal restrictions upon Raystay at the time, but they were, they were conditions that you knew Greyhound wanted.

Indeed, since the purpose of the agreement was to refinance, the quid pro quo for any restrictions Raystay accepted would be money, which was not forthcoming until July 1992. There was no inevitability that the proposed terms in TBF Ex. 261 would find their way into the definitive agreement. With respect to the proposed restrictions on TV40, the final agreement did not incorporate the proposed ban on subsidization of TV40. Tr. 5062-5063, 5073-5074.

133. TBF's claim that the Greyhound agreement left Raystay with no way to build the stations is simply wrong. The prohibition on using Greyhound funds to build the stations is meaningless because Greyhound was never asked to fund the construction of those stations. Tr. 5296-5297. George Gardner and Mr. Sandifer understood that there were many ways for Raystay to build the stations notwithstanding what was in the agreement. Glendale Findings, ¶¶415-417 Pp. 220-221. Moreover, Raystay clearly did not view the agreement as preventing construction of the stations because it continued to try and develop a business plan. Tr. 5090-5093. Trinity's

attempt to gloss over the record cannot be tolerated.¹² For the reasons stated herein and in Glendale's findings, no misrepresentation or lack of candor can be found on Raystay's part with respect to the Greyhound agreement.

4. Raystay's Intentions in Seeking Extensions

134. One of the fundamental premises of TBF's and the Bureau's findings is that Raystay filed extension request not so it could construct the stations but so it could sell the permits. Paragraphs 304 and 305 of TBF's findings (Pp. 227-228) read as follows:

304. Even though by late 1991 Raystay had no intention and no practical ability to build the new LPTV stations, it did have a strong motive to keep the construction permits alive as long as possible. George Gardner knew that the permits might be of interest to a buyer of TV40. (Tr. 5278.) He anticipated that there would be other groups besides Trinity that "would have been interested in taking TV40 and probably be interested in the CPs along with it." (Tr. 5277.) Indeed, in a stunning admission on the witness stand, he testified:

"[W]e had Mr. Shaffner who was going to take TV40 off our hands. And I was interested in preserving the construction

¹² Footnote 60 of TBF's findings (P. 227) does not paint an accurate picture of the record. The testimony at Tr. 5099 does not support Trinity's claim that George Gardner was unwilling to provide a personal guarantee. While it is correct that it was not George Gardner's preferred plan (i.e., intention) to fund construction personally, he may have done so if Greyhound denied a request for waiver. Tr. 5339.

permits in the event that he wanted those." (Tr. 5277, emphasis added.)

305. This made perfect business sense, for if a regional network of low power stations was more viable than TV40 alone, as Gardner believed, then potential buyers might very well find TV40 more attractive if the permits could be bought with it as part of a package. This is exactly how Raystay had pitched the sale of its low power properties in response to Trinity's expression of interest in the facilities. (TBF Ex. 230.) Thus, the permits could only enhance Raystay's prospects of selling TV40 and increase its sale value. Moreover, as shown by the sale of the Red Lion permit separately to Grolman in early 1992, the permits had potential sale value independently of TV40. However, to preserve the potential value of the Lebanon and Lancaster permits, Raystay had to get them extended before they expired in January 1992.

The Bureau appears to join in this argument (see Bureau Conclusions, ¶333 Pp. 171-172).

135. As Glendale will show below, any consideration of a possible sale of the permits does not establish any misrepresentation or lack of candor on the part of Raystay. What is significant here is that TBF's claim is contrary to the massive weight of record evidence that it ignores. This argument is yet another example of why TBF's findings are fundamentally unreliable.

136. TBF simply ignores the direct testimony of George Gardner and Mr. Sandifer that the extension applications were

not filed for the purpose of selling the construction permits.

At Tr. 5338, George Gardner testified:

Q. Mr. Gardner, what role did the possibility of selling the Lancaster and Lebanon construction permits play in the decision to file applications to extend those construction permits in December 1991?

A. There was no consideration given. The renewals were never made with the idea of selling the construction permits.

Q. What role did the possibility of selling the Lancaster or Lebanon construction permits play in the decision to file extension applications for those permits in July of 1992?

A. Again, there was never any consideration given to filing an extension application because of the sale of the permits.

Mr. Sandifer testified that if Raystay's intent had been to sell the construction permits, it would not have bothered to file for extension applications because the amount of money it could have received for the permits would have been insignificant and not worth the time and effort involved. Tr. 5184-5185.¹³ Another telling point which shows that Raystay did not file extensions for the purpose of seeking extensions is that in negotiating the Greyhound agreement, Mr. Sandifer

¹³ TBF's objection to the question on the grounds that it "[c]alls for speculation I think" (Tr. 5184) is highly ironic. All TBF has to support its argument that Raystay filed extensions to sell the permits is rank speculation.

did not negotiate an explicit provision that would have allowed Raystay to sell the permits to a third party without Greyhound's permission. Tr. 5185, see TBF Ex. 264, P. 14.

If Raystay had wanted to sell the permits, he would have negotiated such a provision. Tr. 5185. He did negotiate, however, a provision which gave Raystay and its principals another means of constructing the stations. Tr. 5087-5090, 5182-5183.

137. George Gardner's "stunning admission" is not the dramatic admission TBF makes it out to be, and it certainly does not establish that he filed extensions to sell the permits. TBF takes an isolated piece of testimony out of context. Immediately before and after the testimony TBF cites, George Gardner emphasized his desire to develop a business plan and build the stations. Tr. 5277-5278. In the following question and answer, he clarified that the permits were not offered for sale. Tr. 5278. The most that can be gleaned from this testimony is that if Raystay had sold TV40, it would have been willing to sell the permits. Tr. 5278. TV40 has not been sold to this day, however. Raystay had no interest in selling the Lancaster or Lebanon permits separate and apart from TV40. Tr. 5228-5229.

138. Another fundamental flaw in TBF's argument is that Raystay never made any serious effort to look for a buyer for the construction permits after it filed the first extension

application. Mr. Shaffner was not very interested in the construction permits. Tr. 5232-5233. The record refers to some very preliminary contacts with a Mr. Powley, who approached Raystay but then decided he was not interested in the permits. Tr. 5047-5048. That was the last inquiry Raystay had concerning the possible purchase of the permits. Tr. 5048, 5050. The Mr. Carr who was referred to was looking for a job. Tr. 5049. The only time Raystay ever contacted a potential buyer was David Gardner's letter to LPTV. TBF Ex. 248. George Gardner was unaware of this letter (Tr. 5281), and the letter was so insignificant to David Gardner that he probably forgot about it by the time the second extension application was prepared. Tr. 4859. If Raystay extended the construction permits to sell them, its subsequent conduct sure does not show that fact. Indeed, the record clearly shows that TBF has distorted the record and simply ignored evidence which shows its argument to be half-baked.

5. The Engineer's Visit to the Sites

139. One of the statements in Exhibit 1 read as follows:

A representative of Raystay and an engineer have visited the antenna site and ascertained what site preparation work and modifications need to be done at the site.

In ¶¶335-336 of its proposed findings (Pp. 245-246), TBF argues that the statement was misleading because "[c]ontrary

to the clear implication of the statement, no Raystay engineer had ever visited the site(s)." The Bureau makes the same argument. Bureau Conclusions, ¶335 P. 173. There are several fundamental defects with this argument. First, the statement is true as written, so it cannot be considered a misrepresentation. There is no implication that the engineer in question was a Raystay employee. Second, it is utterly unimportant whether the engineer who visited the site was paid by Raystay or someone else - the important point is that Raystay had the benefit of Mr. Riley's thoughts and analysis. Third, Trinity's argument that Riley's findings were meaningless to Raystay (¶335, P. 246) is wrong.

140. This argument is yet another attempt to turn a true statement into a misrepresentation by making the statement state something it does not say. In order to have a misrepresentation, there must first be a false statement. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (1983). Here, there is no dispute that Mr. Riley visited the sites. The plain language of the statement shows that no implicit or explicit claim is being made as to who the engineer worked for. Indeed, the specific reference to the representative as being a representative of Raystay, and the absence of any mention as to who the engineer was, could suggest that the engineer in question was not affiliated with Raystay. The blatant attempt to rewrite Exhibit 1 to make it

say something that it did not say is just further proof that the findings of TBF and the Bureau cannot be relied on.

141. The fact that Mr. Riley was not an engineer employed by Raystay did not make it improper for Raystay to mention him in the exhibit. Indeed, Mr. Riley was not a Trinity engineer in the sense that he was employed by Trinity - he was an independent contractor. Companies regularly use such independent contractors. The real complaint of TBF and the Bureau is that Mr. Riley was paid by TBF, not Raystay. That fact is utterly meaningless, however. What is significant is that Raystay had the benefit of Mr. Riley's analysis. Mr. Riley gave David Gardner a favorable recommendation of the Lebanon site. Tr. 4802. He also pointed out two problems he saw with the Lancaster site - dust and the strength of the structures. Tr. 4800, 4806-4807. While the permits were not going to be sold to Trinity when the extension applications were filed (see TBF Ex. 238), Raystay had the benefit of Mr. Riley's analysis, which it was free to use in building the stations. TBF's argument that Mr. Riley did not ascertain any site preparation work or modifications because he rejected the site (§337, P. 247) is wrong. He convinced David Gardner to consider modifications to address the dust and strength problems. Tr. 4807. David Gardner visited the Lancaster site for the second time because of Mr. Riley's concerns. Tr. 4800.

142. TBF's other arguments concerning Mr. Riley's visits are equally specious. That George Gardner misunderstood the sentence does not make the sentence false or misleading. TBF claims that David Gardner perceived the sentence to be misleading because he told Mr. Schauble that the engineer had worked for Trinity. Trinity Findings, ¶336 P. 246. If the Presiding Judge reviews the cited testimony (Tr. 4749-4750), however, he will see that David Gardner mentioned this fact in the telephone conversation before Exhibit 1 was ever drafted. TBF also ignores David Gardner's testimony that he believed Exhibit 1 was accurate when he reviewed it. Glendale Ex. 209, P. 7. He was not surprised by the reference to the engineer, and he did not read the sentence as saying the engineer was a Raystay engineer. Tr. 4758-4759.

6. Discussions With Program Suppliers

143. In ¶364 of its proposed findings (P. 262), TBF notes Raystay's representation that it had discussions with program suppliers concerning programming for the LPTV stations. It argues:

Raystay's representation in Exhibit 1 that discussions had been held with program suppliers, while correct as far as it went, was materially misleading because there is no reliable evidence that any such discussions had occurred for many months when Raystay filed for the extensions.

Again, it is TBF's findings that are "materially misleading". The very testimony relied upon by TBF demonstrates that such discussions continued well into 1992. It also ignores the elementary point that the exhibit does not state when the discussions took place, and the Mass Media Bureau deemed such information unnecessary. Finally, TBF's admission that the statement was true shows that there is no misrepresentation in the statement.

144. Paragraph 366 of TBF's findings is highly misleading. It purports to show that David Gardner's discussions with program suppliers could not have continued into late 1991 and 1992. In the second sentence, however, TBF offers much less than it promises. The sentence reads, "However, he admitted that some such discussions related to TV40, not the new construction permits." (Emphasis added). A review of David Gardner's testimony (Tr. 4832-4833) clearly shows that he had continuing discussions with program suppliers concerning the permits in late 1991 and 1992:

Q. When did you have the discussions with program suppliers that are referred to in that sentence?

A. I had ongoing discussions with program suppliers prior to the, the grant of the LPTVs up into 1990, 1991, 1992, possibly even later than that.

Q. Were those discussions in connection with TV-40 or in connection with the new low-power permits?

A. Some of the discussions were in respect to TV-40, some of the discussions were in specific respect to the new low-power permits.

TBF's findings are misleading in other respects. In attempting to attack David Gardner's credibility, it argues that his testimony did not "identify a single program supplier with whom he spoke regarding programming for the new LPTV stations." Trinity Findings, ¶366 P. 263. It conveniently ignores his detailed testimony describing the types of program suppliers he talked to and the types of programming considered. Tr. 4887-4888. With respect to Mr. Sandifer's discussions with program suppliers, it fails to note that while his specific discussions related to TV40, those discussions were relevant to the permits because the idea was to link TV40 and the permits into a network. Tr. 5132-5133.

145. In a classic case of distorted logic, TBF claims that David Gardner could not have had discussions with program suppliers in late 1991 and 1992 because he was acting at the request of Harold Etsell and Mr. Etsell discontinued his involvement in the project in early 1991. TBF Findings, ¶366 Pp. 262-263. First, as Glendale will show below, the record is highly unclear as to whether Mr. Etsell's involvement ended permanently in early 1991. Moreover, even if it is assumed that the involvement did end in early 1991, all David Gardner testified to was that Mr. Etsell "asked me to contact certain

program suppliers..." Tr. 4876. He did not testify that all of his discussions with program suppliers were at the behest of Mr. Etsell. TBF's reliance on this strained and illogical argument shows how weak its arguments are.

7. Lack of Interest by Other Entities

146. In Subsection (3)(E) of its proposed findings concerning the December 1991 extension applications (¶¶369-373, Pp. 264-266), TBF goes to considerable lengths to argue that the following paragraph was "completely deceptive":

The denial of this extension request could eliminate any possibility of the proposed LPTV service being offered to the community. No application mutually exclusive with Raystay's construction permit application was filed, so no other entity has expressed an interest in providing this service.

What TBF does not put in its proposed findings is that the Presiding Judge told TBF in no uncertain terms at hearing that it was misreading the sentence and that its argument was frivolous. See Tr. 4697-4698:

Q. So was it not a flat lie to say in Exhibit 1 that, "No other entity has expressed an interest in providing this service?"

MR. SCHAUBLE: Objection.

JUDGE CHACHKIN: Sustained. That's not what it says, counsel. You know what it says. It says, "No application mutually exclusive of Raystay's construction

permit was filed, so no other entity has expressed an interest in providing the service." That's what it said. You have to read the whole sentence. The sentence deals with the application. Now, if you say they have a requirement to report -- are you saying they're required to report the facts that there were pending negotiations with other entities to acquire this station, that that somehow makes this sentence inconsistent? Is that what you're saying?

MR. EMMONS: I'm, I'm --

JUDGE CHACHKIN: Is that what you're saying, that they -- did they have a requirement to -- but that's entirely -- it has nothing to do with this sentence. This sentence deals with the fact that no other application for a construction permit had been filed. That's what the sentence says. It doesn't say anything else and I don't see any basis for arguing that the fact they had negotiations with Trinity and many other applicants is inconsistent with this sentence. I don't see any basis for it.

TBF's stubborn reliance on such a patently weak argument shows how weak its position is. Moreover, its failure to even acknowledge the Presiding Judge's ruling demonstrates that it has no real response to that ruling.

8. The July 1992 Extension Applications

147. With respect to the second set of extension applications filed by Raystay in July 1992, TBF argues that those applications contained a new misrepresentation:

In one very important respect, moreover, they added a new deception: they inherently implied that the pre-construction activities described in Exhibit 1 had occurred during the January-July 1992 extension term. However, even accepting the testimony most favorable to Raystay, virtually none of the activities described in Exhibit 1 had occurred during that six-month period.

Trinity Findings, ¶380 P. 270. Leaving aside for the moment the fact that several of the activities described in Exhibit 1 did continue in 1992, both Trinity and the Bureau (¶¶337-338 P. 174) distort the plain language of Exhibit 1. A plain reading of Exhibit 1 demonstrates that there is no representation, implicit or explicit, that any of the activities (with one possible exception discussed below) took place in 1992. This argument is yet another attempt to make the exhibit say something it did not say.

148. No dates or times are given for any of the activities described in Exhibit 1. If one saw the December 1991 extension applications and then received applications in July 1992 with the same, identical exhibit, the logical inference to draw would be that nothing of substance had occurred between the first and second extension applications. Furthermore, the same Bureau that is now arguing it was somehow deceived was patently uninterested in dates when it granted the applications - it never asked Raystay when any of the described activities had taken place. If Raystay was

obligated to give specific dates, the Bureau would have requested such information, since it is perfectly obvious that specific dates are not in the exhibit.

149. Moreover, TBF and the Bureau ignore a contemporaneous piece of evidence which shows that Raystay was not claiming that the activities in Exhibit 1 all took place in 1992. When Mr. Schauble wrote David Gardner on June 29, 1992 concerning preparation of the second set of extension applications (TBF Ex. 249), he wrote:

The last time we had the permits extended, we used the enclosed exhibit. Please let me know if any additional planning has been done that we can use to convince the Commission that Raystay has been diligent in working to get the stations on the air. If there are such facts, I will modify the exhibit. Otherwise, we will use the same exhibit.

In other words, the plain intent was if there was nothing new, the same exhibit would be used. TBF's claim that precedent requires the exhibit to be read as stating that each activity took place within the last six months (TBF Findings, P. 270 n.81) is totally contrary to the plain language of the exhibit and to common sense. In any event, none of the cases say that an extension application must be read in that particular manner. If the activities described in Exhibit 1 took place, the exhibit was accurate regardless of when they occurred. The Bureau, who is responsible for making the determination as

to what must be in an application (Tr. 5392), did not see the inclusion of dates as necessary. The ex post facto attempt to put something in the application that was not there must clearly be rejected.

9. Conclusion

150. The major defects in the findings of TBF and the Bureau do more than demonstrate that the specific arguments in question must be rejected. They demonstrate that those findings may not be relied upon. The repeated attempts to ignore crucial and probative evidence and to make Exhibit 1 say things it does not say show nothing in those documents can be accepted at face value. Both documents are fundamentally unreliable.

B. The Lack of Candor Allegations

151. TBF (joined, in some cases, by the Bureau) argues that Exhibit 1 gives a misleading impression and that Raystay failed to disclose certain "facts" "which, if disclosed, would have given the Commission a completely different picture..." Trinity Findings, ¶¶311-315, Pp. 232-234. This argument must be rejected for several reasons. First, TBF fundamentally misstates the law by claiming that any failure to disclose must be considered lack of candor and that a wholly true statement can be disqualifying if it paints a "misleading impression." Second, several of the "facts" alleged by TBF

are not facts at all. Third, Raystay had no obligation to report some of the facts noted by TBF. Fourth, even if Raystay should have reported some matters that were not reported, neither TBF nor the Bureau have provided any competent evidence of intent to deceive, which is an essential element of lack of candor.

1. Legal Standards

152. TBF claims that lack of candor is present whenever "an applicant fails to provide 'all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited'". Trinity Conclusions, ¶706 Pp. 488-489, citing Telephone and Data Systems, Inc., 9 FCC Rcd 938, 945 (1994). That definition is materially incomplete because it omits an essential element of lack of candor - intent to deceive the Commission. Fox River Broadcasting, Inc., supra. The mere failure to provide an explanation (or a complete explanation) does not establish lack of candor. Cannon Communications Corp., 5 FCC Rcd 2695, 2705 n.18, 67 RR 2d 1159, 1166 n.18 (Rev. Bd. 1990). Indeed, a reading of the Telephone and Data Systems case demonstrates that intent to deceive is an essential element of lack of candor. In ¶30, the Commission recognized that the pertinent question was whether someone "was attempting to mislead the Commission..." Similarly, in ¶33, the Commission noted, "there is a strong reason to believe that any inconsistencies

and misstatements... were intentional." If intent to deceive was not an element of lack of candor, that observation would be meaningless.

153. TBF's citation of Telephone and Data Systems, Inc., supra, is purportedly designed to answer a question posed by the Presiding Judge at the end of the hearing on this issue. TBF's argument, however, does not answer the question actually posed by the Presiding Judge. The Presiding Judge requested the following:

So, here we have a situation where it appears to me that a portion of the information sought by the Commission was not provided, and the question I have is whether that constitutes lack of candor. It's a different situation where you provide a partial answer and then you could argue that you should have provided a more complete answer. But it seems to me that two parts of the response have not been, have not been provided at all. And what I would like Parties to give me when they write findings is to provide me with some cases -- case law as to whether under those circumstances that constitutes a misrepresentation or a lack of candor, recognizing, of course, that if the Commission felt that the information was insufficient, if it didn't comply with the form, that the Commission could have turned down the extension or requested further information, which it did not do.

Tr. 5342-5343 (emphasis added). As Glendale noted in its proposed findings, the Cannon and Fox River cases clearly demonstrate that a failure to answer (or the provision of an